

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DWAYNE L. BARRETT**  
Claimant

VS.

**BARBER CONSTRUCTION, LLC**  
Respondent

AND

**ACCIDENT FUND INS. CO. OF AMERICA**  
Insurance Carrier

Docket No. 1,037,495

**ORDER**

Respondent and its insurance carrier (respondent) request review of the March 20, 2008 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

**ISSUES**

The Administrative Law Judge (ALJ) found that the claimant suffered an accidental injury and ordered temporary total disability compensation commencing October 7, 2007 as well as medical treatment through Dr. Manguoglu until the claimant reaches maximum medical improvement.

Respondent requests review of this decision alleging the credible evidence establishes that claimant's present low back complaints did not arise out of and in the course of his employment. Thus, the ALJ's preliminary hearing Order should be reversed and all benefits should be denied.

Claimant argues that the ALJ's Order should be affirmed in all respects.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The bulk of the facts surrounding this claim are not in dispute. Claimant was employed as a truck driver for respondent's heavy construction company. Sometime in March 2007 he was required to lift a large piece of metal. Claimant estimates the weight of this plate at 300 pounds while his employer says it was more likely 150 pounds and lifted by two individuals. Claimant testified that he felt an immediate onset of low back pain following this event.

Sometime thereafter, he says the pain moved from his low back to his testicles. Claimant testified that he told his supervisor Jim Barber of the pain in both his back and his testicles. Mr. Barber seems to deny that claimant told him anything about a back injury. Mr. Barber testified that claimant told him of swelling in his testicles, but initially denied that claimant told him about back pain. Then, Mr. Barber conceded that he thought claimant did mention the back. But later on his testimony, Mr. Barber clarified himself and said that it was only groin pain that claimant disclosed. But, Mr. Barber agrees that he told claimant to go to the local hospital to address his complaints.

On April 18, 2007, claimant went to the local emergency room and reported a pull in his groin along with radiating pain from his abdomen and down into his flank. There is no mention of low back pain in these records. He was diagnosed with epididymitis, given antibiotics and taken off work for a week. He then returned to work performing regular duties. Claimant worked for respondent without complaint or medical treatment from that time until late May or early June, when he took another job with another company. Claimant admits he changed jobs for financial reasons and it had nothing to do with his pain complaints.

While working for his subsequent employer, claimant experienced an increase in his symptoms while driving the large trucks. But he maintains that he got no worse. After working there for a few months, claimant lost his transportation to the job and was no longer able to work. He concedes that his failure to continue working was due to the lack of transportation rather than an inability to perform the job duties.

On October 7, 2007, claimant was mowing a yard and after 30 minutes on a riding lawn mower, he began to experience a significant increase in his low back complaints. He sought treatment from a local emergency room. These records reference a prior back injury months before. This hospital visit apparently led to some diagnostic tests, including x-rays and an MRI. The MRI revealed a bulging disc at L5-S1.

Claimant again sought emergency treatment on October 30, 2007. This record also references a lifting incident on March 1, 2007 while working for respondent. Again on November 19, 2007 he went to the emergency room, this time after stepping into a hole and experiencing an increase in back pain. But this hospital record does reference a March 1, 2007 incident picking up steel.

Finally, on December 19, 2007, claimant went to the hospital again after slipping on ice. There was no reference to a work-related injury, but the records do reflect chronic low back pain.

At his lawyer's request, claimant was evaluated by Dr. Joseph Huston in February 2008. Dr. Huston reviewed the earlier medical records, x-rays and the MRI and concluded that:

The MRI findings are quite consistent with the history and clinical findings. He [claimant] does need further active treatment. . . . Judging from the history I was able to obtain [that] this disc problem is a direct result of activities on the job.<sup>1</sup>

The ALJ concluded that claimant did suffer an accidental injury in March 2007 and awarded benefits based upon that conclusion. Respondent takes issue with this conclusion alleging that claimant's initial physical complaint was to his testicles. And that any back complaints he might have emerged months after leaving respondent's employ and after he worked for another employer and experienced another intervening accident while on a riding lawn mower.

Claimant contends that while the medical records are not altogether clear about his initial low back complaints, the records are relatively consistent at referring to his March 2007 lifting accident while in respondent's employ. And to further support the work-related nature of his low back complaints, claimant points to the fact that an accident report was filed and that he was drug tested during one of his hospital visits.

After reviewing the entire record, as is presently developed, this Board Member finds that claimant did indeed suffer a work-related injury in March 2007. Respondent's brief and Mr. Barber's testimony make that clear. But, this Board Member is not persuaded that claimant's present low back complaints stem from that accident and are causally related to his work for this respondent.

The evidence establishes that claimant was lifting heavy pieces of metal while working for respondent. And it is uncontroverted that he felt an onset of pain and sometime thereafter, complained to Mr. Barber, sought treatment and was diagnosed with an infection in his testicles. How those two events are connected is wholly unexplored in this record. While Dr. Huston believes that claimant's disc problem, which was not diagnosed until October 2007, over 4 months after he left respondent's employ, is attributable to his employment with respondent, that conclusion is without explanation or support.

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<sup>1</sup> P.H. Trans., Cl. Ex. 1 at 4 (Dr. Huston's report dated Feb. 15, 2008).

After leaving respondent's employ, claimant worked for several months for another employer, driving a large truck. While driving this truck he admitted his symptoms increased. Within approximately a month after leaving that employer, he presented to the emergency room complaining of an increase in back pain following his use of a riding lawn mower. Only then was he diagnosed with a bulging disc. In light of these facts, along with the fact that claimant had no back complaints and was diagnosed with a testicular *infection* rather than any sort of back injury in April 2007, this Board Member finds the ALJ's Order should be reversed and benefits should be denied.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>2</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated March 20, 2008, is reversed and benefits are denied.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May 2008.

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JULIE A.N. SAMPLE  
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant  
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge

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<sup>2</sup> K.S.A. 44-534a.